(1)

Supreme Court, U.S.
FILED

001062 DEC 26 2000

No. _____

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

YEI-HWEI TONG,

Petitioner

v.

DAVIS RAY GUTIERREZ aka DAVID GUTIERREZ, D. RUSSO, JIM KERMODE, DAVID A. LAWTON, THE CITY OF SAN GABRIEL,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED

1. Whether Court Of Appeals For The Ninth Circuit Should Ignore The Issue Re The District Judge's Abuse Of Discretion In Refusing Petitioner's Request For One-Day Continuance Of The Trial ?

2. Whether Court Of Appeals For The Ninth Circuit Should Ignore The Fact That Respondents Had Never Presented Evidence Supporting Their Allegation That Petitioner Had Made A U-Turn In A Business District On 4/3/96 ?

3. Whether Court Of Appeals For The Ninth Circuit Should Ignore The Fact That Respondents Had Never Presented Any Tapes Supporting David Ray Gutierrez' Sayings That He Had Called His Supervisor and Back Up Units On 4/3/96 ?

4. Whether Court Of Appeals For The Ninth Circuit Should Ignore The Fact That Respondents Had Repeatedly Failed To Provide Adequate And Responsive Responses To Petitioner's Discovery Requests ?

5. Whether Court Of Appeals For The Ninth Circuit Should Ignore The Fact That A "Final Judgment" Existed And Ordered "Each Party To Bear Its Own Costs" ?

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Petitioner Yei-Hwei Tong prays that a Writ of Certiorari be issued to review the Memorandum of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit/Panel") filed on Sep 27, 2000. because the panel had ignored rulings of this Court, its own precedents and issues raised in the Appelant's Opening Briefs, 99-55998 and 99-56352, as stated in the "Reasons for Granting The Writ" of this Petition.

MEMORANDUM AND ORDER BELOW

The Memorandum of the Ninth Circuit was filed on "Sep 27, 2000" and is print -ed in Appendix A. All other related order, Final Judgment, and portions of the Appellant's Opening Briefs, 99-55998 and 99-56352, are printed in Appendixes B through E.

JURISDICTION

The Memorandum of the United States Court of Appeals for the Ninth Circuit was filed on September 27, 2000. The jurisdiction of this Court rests on 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

28 USCS 471 et seq.

> **District Courts are required to develop and implement a Civil Justice Expenses and Delay Reduction Plan. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolution of civil dispute.**

1993 Amendment to Rule 26 of FRCP

> **Parties must, without awaiting a discovery request, voluntarily identify and disclose all witness and documents "relevant to disputed facts alleged in the pleadings."**

FRCP Rule 8

> **Simple, concise and direct allega -tion are ordinarily sufficient**

to state a claim upon which relief may be granted.

FRCP Rule 26 (a)(1)

Parties have an ongoing duty to supplement their initial disclosure at appropriate intervals upon determining that the initial disclosure are materially incomplete or inaccurate.

FRE, Rule 403

Protects against evidence that is unfairly prejudicial.

FRCP Rule 16 (b)(3)

A scheduling conference order will limit the time to complete discovery.

Rule 54(d) of FRCP provides - Costs -

Except when express provision there -for is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party, unless the court otherwise directs.

Rule 59 (e) of FRCP -

Motion To Alter or Amend a Judgment

A motion to alter or amend the judgment shall be served not later than 10 day after the entry of judgment.

28 USCS 1920

costs for depositions not introduced at trial are generally not compensable.

42 USCS 1988

Request for attorney fees is treated as motion for costs.

STATEMENT OF THE CASE

A. Procedural History:

Please see "Procedural History" contained in Appendixes D's and E's "Statement of the Case".

B. Statement of Facts:

Please see "Statement of Facts" contained in Appendixes D's and E's "Statement of the Case".

REASONS FOR GRANTING THE WRIT

The Memorandum of the panel erred in the resolutions of important and recurring issues significantly affecting the administartion of justice, because:

1. **The Ninth Circuit Should Not Ignore The Issue Re The District Judge's Abuse Of Discretion In Refusing Petitioner's Request For One-Day** Continuance Of The Trial

As shown in Appendix E, pages E-8 thru E-13, petitioner's first issue is the "district judge had abused his discretion in refusing plaintiff's request for one-day continuance." In the Petitioner's Brief, petitioner had cited many authorities in supporting of petitioner's assertion. The panel's memorandum did not say why anyone of the authorities was not applicable. The panel did not say why petitioner did not have a right to counsel as held in Birt v. Montgomery (1984, CA11 Ga) 725 F2d 587; Schooley v. Kennedy **(8th Cir. 1983) 712 F2d 372; and** Anderson v. Sheppard **(1988 CA6 Mich) 856 F2d 741).**

2. **The Ninth Circuit Should Not Ignore The Fact That Respondents Had Never Presented Evidence Supporting Their**

Allegation That Petitioner Had Made A U-Turn In A Business District

As shown in Appendix E, pages E-1 thru E-7 and E-15 thru E-20, petitioner filed a complaint against respondents for violations of petitioner's civil rights under the Fourth Amendment and 42 USCS 1983 and 1985. Respondents had never produced any evidence supporting respondent David Ray Gutierrez' false accusation that petitioner had made a U-Turn in a business district on 4/3/96.

Since respondents had repeatedly fail-ed to produce any evidence supporting respondent Gutierrez' "Police Profiling/ False Accusation", the panel should not affirm the district court's ruling dismissing respondents D. Russo, Jim Kermode, Davis A. Lawton, and the City of San Gabriel from petitioner's case. (see Hudson v. McMillian, 503 U.S. 1

(1992) - the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury; Unigard Sec. Ins. Co. v. Lakewood Engineering Mfg. Corp. (9th Cir. 1992) 982 F2d 363, 368 - An inference may be drawn that evidence destroyed or suppressed was adverse to the party suppressing it).

3. The Ninth Circuit Should Not Ignore The Fact That Respondents Had Never Presented Any Tapes Supporting David Ray Gutierrez' Sayings That He Had Called His Supervisor and Back Up Units On 4/3/96

In petitioner's complaint for respondents' violations of petitioner's civil rights, petitioner had stated that respondent Gutierrez had falsely testifi-ed that he had called his supervisor and back-up units on 4/3/96. Throughout the proceedings in the district court and in

the Ninth Circuit, respondents and their attorneys had failed to present evidence to rebute petitioner's assertions.

In Herbert v. Lando (1979) 441 U.S. 153, 99 S.Ct. 1635, this Court held:

> "The basic purpose of discovery is to take game element out of trial presentation by enabling parties to obtain evidence necessary to evaluate and resolve their dispute beforehand."

FRCP Rule 8 provides:

> "Simple, concise and direct allegation are ordinarily sufficient to state a claim upon which relief may be granted."

As held in Unigard, Supra, the panel should not ignore these facts and should not affirm the district court's dismissal of respondents D. Russo, Jim Kermode, David A. Lawton, and the City of San Gabriel from petitioner's complaint.

4. The Ninth Circuit Should Not Ignore The Fact That Respondents Had Repeated -ly Failed To Provide Adequate And Responsive Responses To Petitioner's Discovery Requests

During the district court's trial, the district judge granted Eugene J. Egan's, attorney for respondents, motion to bar petitioner's discovery requests and respondents' responses to be introduced to the Jury.

In respondents' responses to petitioner's Interrogatories, Request for Admissions, and Request for Production of Documents, respondents had not provided adequate and responsive responses to petitioner's discovery requests.

In Crawford v. Edmonson (1985 CA9 Cal) 767 F2d 549, the court held:

> "Since most evidence presented by one party in litigation will presumably be prejudicial to the other, in the sense that it favors the party introducing it and damages the opposing party's case."

Since respondents and their attorneys had repeatedly ignored FRCP Rule 26 and Discovery Rules and had repeatedly

failed to provide adequate and responsive responses to support respondent Gutierrez' "false accusation/police profiling", the panel should not ignore these facts in affirming the district judge's judgment.

5. The Ninth Circuit Should Not Ignore The Fact That A "Final Judgment" Exist -ed And Ordered "Each Party To Bear Its Own Costs"

In the Memorandum, the panel did not give reasons why petitioner should pay the deposition costs when the deposition was not lodged and was not used at trial and why the district court's FINAL JUDGMENT was not final and respondents should not file a motion for altering or amending the FINAL JUDGMENT as per FRCP Rule 59 (e) (see Morgan v. Union Metal Mfg. (1985 CA6 Ohio) 757 F2d 792 - Judgment is final for purpose of appeal although amount of attorney fees has not been determined; Three-Seventy Leasing

Corp. v. Amex Corp. (1976 CA5 Tex) 528 F2d 992 - Rule 54 (d) does not give district court power to award costs to nonprevailing party. BUT ONLY GIVES THAT COURT DISCRETION TO ORDER THAT EACH PARTY BEAR PART or ALL of Its Own Costs: Nelson v. Darragh Co. (1998 WD Ark) 120 FRD 517 - Prevailing defendants who had filed motion for costs pursuant to Rule 54 (d) were not entitled to have taxed as expenses of depositions which were not introduced at trial; Wolfe v. Wolfe (1983, DC SC) 570 F Supp 826 - costs for depositions not introduced at trial are generally not compensable under Rule 54 (d) and 28 USCS 1290.)

Since the panel did not give reason and authority explaining the district court' FINAL JUDGMENT was not Final. the panel erred in affirming the

district court's post judgment order.

CONCLUSION

In light of the foregoing points and authorities and the attached Appendixes. Petitioner respectfully requests that a Writ of Certiorari be issued to review the Ninth Circuit's Memorandum and to review the district court's order because the panel and district judge had failed to disburse of justice and wisdom as shown in the panel's Memorandum and the district court's Final Judgment and 6/21/00 Order.

Dated: December 26. 2000

Yei-Hwei Tong

Yei-Hwei Tong.
Petitioner Pro Se

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 27 2000

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON CLERK, U.S. COURT OF APPEALS

YEI-HWEI TONG,	)	
	)	
Plaintiff-Appellant,	)	
	)	Nos.
v.	)	99-55998
	)	99-56352
DAID RAY GUTIERREZ; D.RUSSO; JIM KERMODE; DAVID A. LAWTON; CITY OF SAN GABRIEL,	)	D.C.No. CV-97-02138-DDP
	)	
Defendants-Appellees.	)	1
	)	MEMORANDUM

Appeal from the United States District Court for the Central District of California

Dean D. Pregerson, District Judge, Presiding

2

Submitted September 11, 2000

Before: WALLACE, FERNANDEZ, and McKEOWN, Circuit Judges.

In appeal no. 99-55998, Yei-Hwei Tong appeals pro se the district court's judgment in her civil rights action,

dismissing it in part for failure to state a claim, entering judgment as a matter of law for defendants Lawton and the City of San Gabriel, and upholding a jury's verdict for defendant Gutierrez. In appeal no. 99-56352, Tong appeals the district court's order awarding costs to defendants. We have jurisdiction under 28 U.S.C. Section 1291. We affirm.

The district court's order dismissing Tong's 42 U.S.C. Sections 1981 & 1985 action against defendants was proper because she failed to allege specific evidence demonstrating racial animus under section 1981. see Evans v. McKay, 869 F.2d 1341, 1345 (9th Cir. 1989), or or a conspiracy under section 1985. see Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 626 (9th Cir. 1988).

The district court's order dismissing

Tong's 42 U.S.C. section 1983 action against defendants Russo and Kermode was proper because her excessive force claims failed to demonstarate that the defendants were personally involved in her arrest, see Karim-Panahi, 839 F.2d at 625 n.3, and her deliberate indifference claims did not establish that she had a serious medical need, see Jones v. Johnson, 781 F.2d 769, 771-72 (9th Cir. 1986).

The district court's judgment as a matter of law for defendants Lawton and the City of San Gabriel was proper because "the evidence permits a reasonable jury to reach only one conclusion." See Lawson v. Umatilla County, 139 F.3d 690, 692 (9th Cir. 1998).

The district court's denial of Tong's motion to continue the trial was not an abuse of discretion. See United States

ex rel. Hawaiian Rock Prods. Corp. v. A. E. Lopez Enters., Ltd., 74 F.3d 972, 976 (9th Cir. 1996).

The district court's discovery and evidentiary rulings were not an abuse of discretion. See Gilbrook v. City of Westminster, 177 F.3d 839, 858 (9th Cir.), cert. denied, 120 S.Ct. 614 (1999) (evidentiary rulings); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 726 (9th Cir. 1999) (discovery rulings).

The district court did not abuse its discretion in awarding costs to defendants because Tong has not overcome the presumption in favor of awarding costs to them as the prevailing parties. See Fed. R.Civ.P. 54(d)(1); National Info. Servs., Inc. v. TRW, Inc., 51 F.3d 1470, 1471-72 (9th Cir. 1995).

Tong's remaining contentions in appeal

nos. 99-55998 and 99-56352 lack merit.

AFFIRMED.

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1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir.R. 36-3.

2 The panel unanimously finds this case suitable for decision without oral argument. See Fed.R.App.P. 34(a)(2).

THIS CONSTITUTES OF NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

YEI-HWEI TONG,	)	Case no.
	)	CV 97-2138 DDP
Plaintiff,	)	
	)	Filed June 21,
v.	)	1999
	)	Entered June 24,
DAVID RAY GUTIERREZ, et al.,	)	1999
	)	
	)	X MLD NOTICE
Defendants.	)	PTYS
	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND COSTS

The defendants' motion for attorney's fees and costs came before the Court for oral argument on June 21, 1999. After reviewing and considering the materials submitted by the parties and hearing oral argument, the Court grants in part and denies in part the motion.

BACKGROUND

This matter came before the Court and

jury for trial on May 11, 1999. As to defendants David A. Lawton and the City of San Gabriel, the Court granted judgment as a matter of law. As to defendant David Ray Gutierrez, the jury returned a verdict for the defendant. The Court entered judgment on May 13, 1999. In the judgment, the Court stated, "Both parties to bear their own costs and attorney's fees." (Final Judgment 1:6.)

The defendants have moved for costs and attorney's fees. The defendants request fees in the amount of $49,914.50 and costs in the amount of $962.30.

DISCUSSION

A. Legal standard

"A district court may award attorney's fees pursuant to 42 U.S.C. section 1988 to a prevailing civil rights defendant if the plaintiff's action was 'unreasonable,

frivolous, meritless, or vexatious.'" Franceschi v. Schwartz, 57 F.3d 828, 832 (9th Cir. 1995), quoting Vernon v. City of Los Angeles, 27 F.3d 1385, 1402 (9th Cir. 1994).

There is a presumption that costs are awarded to prevailing parties. Fed.R. Civ.P. 54(d)(1); Stanley v. University of S. Cal., 1999 WL 346615 *7 (9th Cir. 1999). The losing party has the burden of demonstrating why the costs should not be awarded. Stanley, 1999 WL 346615 at *7. Factors that courts are to consider include in civil rights cases are the "financial resources of the plaintiff" and whether "payment of the costs would render (the plaintiff) indigent." Id at *9.

A motion for attorney's fees must be filed and served within 14 days of entry

of judgment. Fed.R.Civ.P 54(d)(2)(B). In computing the relevant period of time for service and filing of the motion, "the day of the act, event, or default from which the designated period of time begins to run shall not be included." Fed.R.Civ.P 6(a).

B. Analysis

1. Whether the defendants' motion was timely

The plaintiff argues that the defendants' motion was not timely because it was not filed or served upon the plaintiff within the relevant time frame. Plaintiff argues that the last day to file and serve the motion was May 26, 1999. Plaintiff is incorrect. Because the day of the event is not included in the calculation, the last day to file and serve the motion was May 27, 1999. Here, the defendants filed and served the

motion on May 27, 1999. Accordingly, the defendants were timely.

The plaintiff also argues that the defendants did not properly serve the plaintiff. The plaintiff argues that the defendants mailed the notice to the plain-tiff's attorney at the wrong address. Specifically, the plaintiff argues that although the defendants placed correct street address on the notice, the defen-dants failed to include the suite number.

Generally, notice of a motion by mail is made by sending a copy of the motion "by first class mail, postage prepaid, to the attorney's office at the address shown on the last document he or she filed in the action", and "(S)ervice by mail is complete upon mailing." Schwarzer, et. al, Federal Civil Procedure Before Trial, 12:83 at 12-22

(1999).

The only document filed in this case by the plaintiff's attorney was the substitution of attorney. In that document, the plaintiff's attorney stated his name and address as:

David E. Brockway
Root Brockway & Rothblatt
1605 West Olympic Blvd., #1027
Los Angeles, CA 90015

Therefore, this was the address to which the defendants had to mail notice of motion. see Id.; see also Fed.R.Civ.P. 5(b).

Here, the defendants mailed the notice of the motion to:

David E. Brockway, Esq.
Root Brockway & Rothblatt
1605 West Olympic Blvd.
Los Angeles, CA 90015

(Notice of motion proof of service.)

The defendants failed to include the suite number in the address.

The plaintiff has not shown that she was prejudiced by any delay in service of this motion. The plaintiff has not shown that she did not receive notice of this motion or that the delay hindered her ability to file an opposition to the motion. The plaintiff, however, filed her opposition to the motion one day late. The Court accepted the plaintiff's late filing out of consideration of the delay in service.

2. Whether to grant the defendants' motion

This case involved questions of fact which the jury ultimately resolved in favor of the defendants. The Court cannot conclude as a matter of law that the plaintiff's claims were "unreasonable, frivolous, meritless, or vexatious." Accordingly, the Court denies the defendants' motion for attorney's fees.

As for costs, the plaintiff has not shown that payment of these costs would render her indigent. Additionally, the plaintiff has not addressed whether imposing costs in this case would have a chilling effect. Although some plaintiffs may be deferred from bring cases such as this or pursuing them to trial if they face having to pay substantial costs as in Stanley, those concerns are not present in this case. This was not a high publicity case. Furthermore, costs in the amount of approxiamately $1,000 are not likely to have chilling effect on furture civil rights plaintiffs. Therefore, the plaintiff has not presented sufficient evidence to support a finding that the costs should be retaxed upon the defendants. Accordingly, the Court grants the defendants' motion with respect to

$962.30 in costs. Interest will accrue at a rate of 4.879% from the date of entry of judgment. see 28 U.S.C. Section 1961.

3. Plaintiff's request for sanctions

The plaintiff requested that the Court impose $750 in sanctions on the defendants' attorney for bad faith conduct throughout the proceedings and for "the frivolous filing of the instant motion." (opp. 9:21.) The plaintiff has shown no reason why sanctions would be appropriate. Accordingly, the Court denies the plaintiff's request.

CONCLUSION

The Court denies the defendants' motion for attorney's fees. The Court grants the defendants' motion for costs in the amount of $962.30, with interest accruing at a rate of 4.879% from the

date of entry of judgment. The Court denies the plaintiff's request for sanctions.

IT IS SO ORDERED.

Dated: June 21, 1999

/S/

Dean D. Pregerson
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

YEI-HWEI TONG.	Case no. CV 97-2138 DDP
Plaintiff.	
v.	Filed May 12. 1999
DAVID RAY GUTIERREZ aka DAVID GUTIERREZ. D. RUSSO. JIM KERMODE. DAVID A. LAWTON. THE CITY OF SAN GABRIEL.	Entered May 13. 1999
	FINAL JUDGMENT
	X MLD COPY PTYS
Defendants.	

This matter came before the Court and jury for trial on May 11. 1999. As to defendants David A. Lawton and the City of San Gabriel. the Court granted judgment as a matter of law. As to defendant David Ray Gutierrez. the jury returned a verdict for the defendant.

Therefore. IT IS ORDERED AND ADJUDGED that the plaintiff take nothing. both parties to bear their own costs and

attorney's fees.

Dated: May 13, 1999

/S/

Dean D. Pregerson
United States District Judge

PORTIONS OF THE APPELLATE OPENING BRIEF
9th No. 99-56352

STATEMENT OF THE CASE

A. Procedural History:

On April 2. 1997. plaintiff filed a complaint for damages for violations of Civil Rights. inter alia. against defen -dants DAVID RAY GUTIERREZ ("Gutierrez"). D. RUSSO ("Russo"). JIM KERMODE ("Kermode "). DAVID A. LAWTON ("Lawton"). THE CITY OF SAN GABRIEL ("S.G.City") ("Collective -ly Defendants") and Dickson Motors Service after defendant Gutierrez. on April 3. 1996. who was a reserve police. falsely accused plaintiff made a U-Turn in a business district at the City of San Gabriel. after defendants Russo and Kermode falsely accused plaintiff had injured defendant Gutierrez in order to cover-up defendant Gutierrez' "Police Profiling". after plaintiff was injured

by defendant Gutierrez. and after defen -dants Lawton and "S.G.City" failed to produce proofs showing defendants had adequate and proper training and supervi -sion policies on reserve police.

On May 13. 1999. after a jury trial. the Final Judgment was entered and mailed to "Parties/Counsels" (Exhibit 1). The court below ordered that both parties to bear their own costs and attorney's fees.

On May 27. 1999. defendants' attorneys filed a "Motion for Attorney's Fees and Costs" (Exhibit 2). Defendants' motion was calendared for a hearing on June 21. 1999 and was sent to Mr. David E. Brockway. ESQ. who acted as plaintiff's trial counsel only. at wrong suite number.

On June 8. 1999. after Mr. Brockway forwarded defendants' motion to plaintiff. plaintiff filed her "Opposition" to Defen

-dants' Motion For Attorney Fees and Costs (Exhibit 3).

On June 24, 1999, the court below issued its rulings denying defendants' motion in part and granting defendants' motion in part for attorney's fees and costs (Exhibit 4).

B. Statement of Facts:

1) Plaintiff is an Asian-American and speaks and understands limited English.

2) Defendant Gutierrez is a Mexican-American.

3) Defendant Gutierrez was a self-employed business person.

4) On April 3, 1996, defendant Gutierrez was being utilized as a reserve police for the San Gabriel Police Department paid by per diem by the City of San Gabriel.

5) The incident that is the subject

matter of this lawsuit occurred at about 12:30 p. m. on April 3, 1996 in the park -ing lot at 1133 S. San Gabriel Blvd., San Gabriel, California.

6) Defendant Gutierrez followed plain -tiff into the parking lot at 1133 S. San Gabriel Blvd., San Gabriel, CA. alleging plaintiff made a U-Turn in a business district.

7) Defendant Gutierrez' car parked right behind plaintiff's car at the parking lot.

8) After defendant Gutierrez exited his car, he walked to the driver's side of plaintiff's car and blocked the car's door.

9) Plaintiff's car front doors windows were down.

10) When defendant Gutierrez came to plaintiff's car, she was seated in her

car.

11) Defendant Gutierrez ignored plain-tiff's questions and asked for plain-tiff's driver license and car's registra-tion.

12) Plaintiff had repeatedly told defendant Gutierrez that her driver license and car's registration were in the car's trunk.

13) Defendant Gutierrez became mad, after plaintiff told him repeatedly that her driver's license and car's registra-tion were in the trunk. and grabbed the car door while plaintiff was opening the door to go to the car's trunk.

14) Defendant Gutierrez forcefully pulled plaintiff out of her car. handcuff-ed her hands behind her back. and told her that he had arrested plaintiff.

16) Defendant Gutierrez pushed plain-

tiff against the trunk of plaintiff's car.

17) Defendant Gutierrez kicked plaintiff's legs and ankles.

18) Defendant Gutierrez pushed plaintiff to the ground.

19) Plaintiff had suffered injuries arounnd her wrists, fore-arms, knees, and ankles at the hands of defendant Gutierrez.

20) Defendant Gutierrez had no proof supporting his false allegation that plaintiff made a U-Turn in a business district on April 3, 1996 at about 12:30 p. m. at 1133 S. San Gabriel Blvd., San Gabriel, California.

21) Defendant Gutierrez acknowledged that plaintiff is a little lady.

22) Defendant Gutierrez acknowledged that plaintiff did not require much force to control her.

23) Defendant Gutierrez acknowledged that he could lift plaintiff up.

24) Defendant Gutierrez acknowledged that he picked up plaintiff from both arms.

25) Defendant Gutierrez did not have any evidence to show that he called his Supervisor on April 3, 1996 regarding his unlawful arrest of plaintiff.

26) Defendant Gutierrez did not have any evidence to show that he called back up unit on April 3, 1996 regarding his unlawful arrest of plaintiff.

27) Defendant Gutierrez had no proof supporting his false allegation that plaintiff committed felony on April 3, 1996.

28) Defendant Gutierrez had no proof supporting his claim that he had been trained properly and adequately as a

reserve police to perform the work he was doing on April 3, 1996.

29) Defendant Gutierrez had no proof supporting his claim that he had followed any policy of the San Gabriel Police Department regarding his unlawful stop of plaintiff on April 3, 1996 at 1133 S. San Gabriel Blvd., San Gabriel, California.

30) Defendant Gutierrez found plaintiff's driver license and car's registration in the trunk.

31) Defendant Lawton had no proof showing that he had a policy regarding the training of reserve police.

32) Defendant "S.G. City" had no proof showing that it had a policy regarding the training of reserve police.

33) Defendant Lawton had no proof showing that defendant Gutierrez had called the Police Department after defen

-dant Gutierrez had stopped plaintiff on April 3, 1996.

34) Defendant "S.G. City" had no proof showing that defendant Gutierrez had call -ed the Police Department after defendant Gutierrez had stopped plaintiff on 4/3/96.

35) Defendant Lawton had no proof show -ing that defendant Gutierrez had called defendant Gutierrez' supervisor after defendant Gutierrez had stopped plaintiff on April 3, 1996.

36) Defendant "S.G. City" had no proof showing that defendant Gutierrez had call -ed defendant Gutierrez' supervisor after defendant Gutierrez had stopped plaintiff on April 3, 1996.

37) The court below denied plaintiff's request for one-day continuance.

38) The jury trials were held on May 11 and May 12, 1999.

39) Attorney David E. Brockway, on May 12, 1999, appeared for plaintiff during the trial.

40) On May 13, 1999, The "Final Judgment" was issued by the court below and was entered and mailed to "Parties/ Counsels" by the Clerk's Office.

41) The "Final Judgment" orders both parties to bear their own costs and attorney's fees.

DISCUSSIONS

1. The "Final Judgment" Is Valid

Rule 54(d) of FRCP provides - Costs -

> "Except when express provision there -for is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party, unless the court otherwise directs."

In Goodwin v. U.S. (CA 8th 1995) 67 F3d 149, the court held:

> "To be a 'final' order or judgment for purpose of appeal, there must be some clear and unequivocal manifesta-

tion by the trial court of its belief that the decision made, so far as the court is concerned, is the end of the case."

In Morgan v. Union Metal Mfg. (1985, CA6 Ohio) 757 F2d 792, the court held:

"Judgment is final for purposes of appeal although amount of attorney fees has not been determined."

In Missouri P. R. Co. v. Star City Gravel Co. (1979, CA 8 Ark) 592 F2d 455, the court held:

"While costs are normally awarded prevailing party, such award is with -in sound discretion of trial court."

In Three-Seventy Leasing Corp. v. Ampex Corp. (1976 CA 5 Tex) 528 F2d 993, the court held:

"Rule 54(d) does not give District Court power to award costs to non-prevailing party, but only gives that court discretion to order that each party bear part or all of its own costs."

In Asher v. Ruppa (CA 7th 1949) 173 F2d 10, 11, the court held:

"A judgment is final for the purpose of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined."

In United Bldg. & Loan Ass'n v. Garrett (1946 DC Ark), 64 F Supp 460, the court held:

"Ordinally, costs will be assessed against the defeated party, but the court may direct otherwise."

In the instant case, as Exhibit 1 demonstrates, the "Final Judgment" is valid judgment. Thus, defendants' attor-neys should not file their "Motion for Costs" after defendants and their attor-neys had received the "Final Judgment", which was entered and copies of the "Final Judgment" were mailed to "Parties/Counsels."

2. The Court Below Erred In Granting Defendants' Motion For Costs While Defendants' Motion Was In Violations Of Local Rule 16 Of "CD CA" and FRCP 59

Local Rule 16.3. Bill of Costs - Filing and Form - Notice, Central District of California (CD CA), provides:

"The prevailing party who is awarded costs shall have fifteen (15) days after entry of judgment to file and serve a Bill of Costs on Form AO 133 and in accordance with the instructions on said form. The Bill of Costs shall be attached to a Notice of Application to the Clerk to Tax Costs."

Rule 59 (e) of FRCP provides:

"(e) Motion To Alter or Amend a Judgment

'A motion to alter or amend the judgment shall be served not later than 10 day after the entry of judgment.' "

In Hutchinson v. Staton (4th Cir. 1993) 994 F2d 1076, 1081, the court held:

"Fed.R.Civ.P 59(e) permits an aggrieved party to file a motion to alter or amend a judgment within ten days of its entry."

In Metcalf v. Borba (9th Cir. 1982) 681 F2d 1183, the court held:

"Ten day time limit on filing motion

to alter or amend judgment was appli-cable to postjudgment request for attorney's fees in civil rights case."

In the instant case, as Exhibit 1 demonstrates, the "Final Judgment" orders both parties to bear their own costs and attorney's fees.

In the instant case, as Exhibit 1 demonstrates, the "Final Judgment" was entered on May 13, 1999, was "MLD NOTICE PTYS/COUNSEL", and was "Closed". Therefore, if defendants' attorneys want to recover deposition costs, if allowed, they should file a "motion" to alter or amend the "Final Judgment", not to commingle "motion for costs" with "Motion for attorney fees."

3. The Court Below Erred In Granting Defendants' Motion For Costs For "Deposition Of Plaintiff" While The Motion Had Violated Local Rules 8.1.2 and 9.4.9

Local Rule 8.1.2 of CD CA, Deposition

- Use of Trial or on a Motion, provides:

"Deposition Transcripts to be used at trial or on a motion shall be marked as provided in Local Rule 9.4.9. The original deposition shall be lodged with the clerk on or before the first day of trial."

In Hempstead v. George-Pacific Corp. (1989, WD Ark) 124 FRD 202, the court held:

"Costs would not be awarded pursuant to Rule 54(d) to prevailing defendant for deposition of witnesses where it appeared that it was not necessary for defendant to depose witnesses who primarily lived in area and were available and in fact did testify, so that deposing of witnesses appeared to be merely discovery and not for purpose of utilizing transcripts of witnesses for purpose of trial, and, applying discretionary rule, it appeared that deposition were unnecessary except for edification o attorneys on behalf of their clients."

In Nelson v. Darragh Co. (1988, WD Ark) 120 FRD 517, the court held:

"Prevailing defendants who had filed motion for costs pursuant to Rule 54 (d) were not entitled to have taxed as expense of depositions which were

not introduced at trial."

In Hiegal v. Hill (1985, CA8 Ark) 771 F2d 358, the court held:

"Where costs exceeding those authoriz-ed by statute are to be awarded, District Court should set forth parti-cular circumstances of case which justify such award, especially when unsuccessful civil rights plaintiff is to be taxed such costs following trial of non-frivolous claim."

In Monahan v. Nebraska (1983 DC Neb) 575 F Supp 132, mod on other grounds (CA8 Neb) 748 F2d 1258, the court held:

"Proof of costs is deficient for purposes of Rule 54(d) where only documentary proof submitted is untitled, unnotarozed statement."

In Wolfe v. Wolfe (1983, DC SC) 570 F Supp 826, the court held:

"Just as costs are not allowed for witnesses who do not testify at trial, costs for depositions not introduced at trial are generally not compensable under Rule 54(d) and 28 USCS Section 1920."

In Morris v. Carnathan (1974 ND Miss) 63 FRD 374, the court held:

"Sum paid by prevailing defendant for copy of pretrial deposition of witnes -ses would not be allowed as costs. where witness testified for him at trial, and there was no real need for use of their deposition."

In Gillam v. A. Shyman, Inc. (1962 DC Alaska) 31 FRD 271, the court held:

"Costs for taking depositions are not taxable where witnesses are available for examination at the trial."

"The expense of taking deposition is taxable where, the taking of such was reasonably necessary, and such costs are not allowed where the deposition were not necessarily obtained for use at the trial but for the convenience of counsel in preparing for trial, as for discovery purposes."

In the instant case, as Exhibit 2 (EP 12, 13) demonstrates, defendants' motion for costs had failed to explain the neces -sity to take "Plaintiff's deposition" and to follow Local Rule 8.1.2 and 9.4.9 lodging the "Deposition Transcript" on or before the first day of trial with the Clerk's Office (Please see Exhibit 6,

page 6, nos. 93, 94).

Since there's no real need for use of "Plaintiff's Deposition" and the taking of "Plaintiff's Deposition" was for discovery purpose, the court below erred in granting defendants' motion for costs.

4. The Court Below Erred In Granting Defendants' Motion For Costs While Defendants Should File "Bill Of Costs"

The Local Rule should be in control of defendants' motion for costs.

In the instant case, as Exhibit 1 demonstrates, the "Final Judgment" was entered on May 13, 1999, was mailed to "parties/counsels", and orders "both parties to bear their own costs.

In Re American Casualty Co. (1988, CA 6 Mich) 851 F2d 794, the court held:

"Even if motion for attorneys' fees and costs made 41 days after entry of judgment in favor of movant was treated as motion under Rule 54 (d), which provides for award of 'Costs', District Court are free to adopt local

rules establishing standards for timely filing of request for costs, and District Court acted properly in ruling that application was untimely under local rule setting 30 day dead-line for such application, in denying requested relief based on principles of waiver."

In Rothenberg v. Security Management Co. (1982 CA 11 Ga) 677 F2d 64 34 FR Serv 2d 243, later app (CA 11 Ga) 736 F2d 1470, 39 FR Serv 2d 744, the court held:

"Request for attorney fees under 42 USCS Section 1988 is treated as motion for costs under Federal Rule of Civil Procedure 54(d); therefore, District Court has jurisdiction to entertain motion for award of attorney's fees which was filed after notice of appeal was filed, but prior to expiration of local time period for filing bill of costs."

In Dickinson Supply, Inc. v. Montana-Dakota Utilities Co. (1970 CA 8 ND) 423 F2d 106, the court held:

"A local rule of the North Dakota District Court, providing that within ten days after the notice of entry of judgment allowing costs, the prevailing party should serve on the attorney for the adverse party and file

with the clerk an application for taxation of costs, and that upon failure to comply with the rule, all costs should be waived save the clerk's costs, did not contravene Rule 54(d)."

Local Rule 16.3 gives defendants fifteen (15) days to file their "Bill of Costs".

In the instant case, as Exhibit 1 demonstrates, the "Final Judgment" was entered on May 13, 1999 and was mailed to "Parties and counsels".

Assuming the "Final Judgment" did not have the order: both parties to bear their own costs and attorney's fees, the time for defendants to file their "Bill of Costs" was May 28, 1999. Defendants did not file their notice to alter or amend the "Final Judgment", nor file their " Bill of Costs" within the time as the law or rule prescribe. Instead, defendants filed defendants' motion for costs on May

27. 1999.

Since defendants knew the "Final Judg -ment" orders both parties to bear their own costs and defendants' failures to file "motion to alter or amend" the "Final Judgment" and a "Bill of costs", thus, the court below erred in granting defendants' motion for costs.

CONCLUSION

In light of the foregoing points and authorities, thec ourt below erred and had abused its discretion in granting of defendants' "Motion for Costs."

This court, in the interest of justice and the integrity of the judicial system, should vacate the trial court's order granting defendants' motion for costs.

DATED: January 3, 2000

PORTIONS OF THE APPELLANT'S OPENING BRIEF
9TH No. 99-55998

STATEMENT OF THE CASE

A. Procedural History:

On April 2. 1997. plaintiff filed a complaint for damages for violations of Civil Rights, inter alia, against defendants DAVID RAY GUTIERREZ ("Gutierrez"). D. RUSSO ("Russo"). JIM KERMODE ("Kermode "). DAVID A. LAWTON ("Lawton"). THE CITY OF SAN GABRIEL ("S.G.City") ("Collectively Defendants") and Dickson Motors Service (Exhibit 1) after defendant Gutierrez, on April 3. 1996. who was s reserve police. falsely accused plaintiff made a U-Turn in a business district at the City of San-Gabriel, after defendants Russo and Kermode falsely accused plaintiff had injured defendant Gutierrez in order to cover-up defendant Gutierrez' "Police Profiling" (Plaintiff's Trial Exhibits.

nos. 2, 3, 4, 8, 9, 10), after plaintiff was injured by defendant Gutierrez (Plaintiff Trial Exhibits, nos. 1, 2, 9, 10), and after defendants Lawton and "S.G.City" failed to produce proofs showing defendants had adequate and proper training and supervision policies on reserve police (Plaintiff's Trial Exhibits, nos. 11 thru 22).

On or about May 5, 1997, defendants filed a motion to dismiss and a motion to strike plaintiff's complaint (Exhibit 2).

On June 5, 1997, "Plaintiff's Opposition to defendants' Motion to Dismiss and to Strike, etc.." was filed (Exhibit 3).

On August 8, 1997, a "Notice of Ruling" re the 8/4/97 Status Conference" was sent by defendants' attorneys (Exhibit 6).

In the August 4, 1997 court's ruling,

there is no Discovery Cut-off date and Motion Cut-off date. The court below had never issued any order regarding the Discovery and Motion Cut-off dates.

On August 18, 1997, an order by the Honorable Dean D. Pregerson, U. S. District Judge, ("Judge Pregerson") was issued dismissing plaintiff's First Claim and Third Claim and plaintiff's Section 1983 claim against defendants Russo and Kermode. Judge Pregerson also granted defendants' motion to strike plaintiff's prayer for attorneys fees.

On September 12, 1997, plaintiff filed the First Amended Complaint for Damages for violation of civil rights against defendants Gutierrez, Lawton, and "S.G. City".

On or about October 2, 1997, defendants filed their motion to dismiss and

motion to strike plaintiff's first amend-ed complaint.

On October 17, 1997, "Plaintiff's Opposition to Defendants' Motion to Dismiss and to Strike, etc." was filed.

On October 27, 1997, the court below granted defendants' motion to dismiss and motion to strike. At the same time, the court below ordered defendants to answer plaintiff's remaining claims contained in the First Amended Complaint. The court below issued an "Order Granting Defendants' Motion to Dismiss" on December 1, 1998.

On or about December 15, 1997, defendants filed defendants' "Answer to First Amended Complaint". In defendants' " Answer", defendants denied First Amended Complaint's paragraphs 2, 3, 6 thru 11, 13 thru 15, 19 thru 24, 26 thru 35, and

37. Defendants also raised 14 Affirmative Defenses and made one Reservation.

On Feb. 4, 1998, an "Early Meeting of Counsel" was held in "Briedenback, Buckley, Huchting, Halm & Hamblet" with attorney Waterman, attorneys for defendants, and a "Joint Report of Early Meeting of Counsel" was signed and filed (Exhibit 11).

On February 13, 1998, attorney Waterman filed a "Notice of defendants' motion and motion to continue the trial date.

On February 27, 1998, Judge Pregerson issued an order granting attorney Waterman's motion to continue the trial date from 4/27/98 to 5/5/98 (Exhibit 22).

From July 20, 1997 to February 19, 1998, defendants had repeatedly and willfully ignored and refused to provide adequate and responsive answers to plain

-tiff's Interrogatories, Requests for Production of Documents, and Requests for Admissions (Plaintiff's Trial Exhibits 11 thru 22).

On March 5, 1998, after defendants had repeatedly failed to provide adequate and responsive responses to plaintiff's disco-very requests, plaintiff's "Notices to Take Defendants' Deposition" were served on defendants' attorneys (Exhibit 14).

On March 11, 1998, defendants' attor-neys filed "Discovery Matter, Etc." (Exhibit 24).

On March 18, 1998, "Plaintiff's Opposi-tion to defendants' Motion for Protec-tive Order, etc." was filed (Exhibit 25). On March 24, 1998, Magistrate judge Eick, without a hearing, issued a "Civil Minute - General" granting defendants attorneys' motion not allowing plaintiff

to take defendants' depositions (Exhibit 26).

On April 20, 1998, plaintiff's "Notice of Motion and Motion to continue the trial date, etc." was filed (Exhibit 29).

On April 30, 1998, Judge Pregerson granted plaintiff's motion to continue the trial date and denied plaintiff's request to extend the discovery date.

The court below granted defendants attorneys' request to continue the trial date from 7/21/98 to 11/3/98.

On November 3, 1998, the court below did not hold the trial. Instead, the court below told parties to wait for trial notice.

The court below had contacted with defendants' attorneys regarding the trial to be held in 1999 (Exhibit 13).

On or about May 5, 1999, plaintiff was

notified by the courtroom clerk that the trial date of May 11, 1999.

On May 11, 1999, Judge Pregerson denied plaintiff's 1-day continuance request (RT, 5/11/99).

On May 13, 1999, the Final Judgment was entered (Exhibit 44). The court below ordered that each party to bear their own costs and attorneys' fees.

DISCUSSIONS

1. The Court Below Abused Its Discretion In Refusing Plaintiff's Request For One-Day Continuance Because Plaintiff's Attorney Had Conflicting Schedule

28 USCS Sections 471 et seq. provide that district court are required to develop and implement a Civil Justice Expense and Delay Reduction Plan. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just,

speedy, and inexpensive resolution of civil disputes.

As we may know, courts have inherent power to grant continuances in the furtherance of justice.

17 Am Jur 2d, Continuance Section 3 provides the court's discretionary power must be exercise in a sound and leagl manner, and not arbitarily or capriciously. A court may not refuse a continuance, if properly requested, where the ends of justice clearly require it to be granted. If an abuse of discretion clearly appears, the ruling will be reversed.

17 Am Jur 2d, Continuance Section 5 provides the basis of a continuance in a civil case rests upon the right of a party to have reasonable opportunity to try the case upon its merit. Relief, time -ly and appropriately sought in the form

of a continuance, is properly granted, where the applicant acts in good faith and with due diligence, and where it clearly appears that he is deprived of his right to a fair trial if forced to proceed at the appointed time or continue with a trial or hearing already in process.

In Birt v. Montgomery (1984, CA11 Ga) 725 F2d 587, the court held:

> "A party has a right to counsel of his own choice. Refusal to grant a continuance may interfere with that right because the court is required to give a defendant a reasonable opportuniy to employ and consult with counsel, or the right to counsel would be of little worth."

17 Am Jur 2d, Continuance Section 12 provides:

> "In considering application for a continuance and in inquiring into the grounds thereof, courts general -ly do not view the absence of counsel with much favor."

On May 11, 1999, the court below

abused its discretion in refusing plaintiff's request for one-day continuance of the trial when there was no Exceptional Circumstances (See RT, Page 18) - The court below will not be unduly inconvenience; Defendants will not be prejudiced.

In Schooley v. Kennedy (8th Cir. 1983) 712 F2d 372, the court held that a motion for a continuance should be granted for substitution of counsel.

On May 11, 1999, reasons for plaintiff's request for 1-day continuance was attorney Brockway had conflicting schedule in San Francisco, was plaintiff had language problem, was the court below had continue the trial many times, and was the court below had never contacted with plaintiff regarding the trial schedule after plaintiff had waited for several months and the trial dates had

been changed many times.

In Robert S. Hunter's Federal Trial Handbook, Civil, Lawyers Cooperative Publishing, Oct. 1993, page 76, the Hand-book states A court may not hurry a case to an extent that a party from making a proper presentation of his case.

In Anderson v. Sheppard (1988 CA6 Mich) 856 F2d 741, the court held:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness requires an absence of actual bias in the trial of cases. Our system of law has always sought to prevent even the probability of unfairness. One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal and that fairness requires an absence of actual bias or prejudice in the trial of cases. If this basic principle is violated, the judgment must be reversed. Bais or prejudice may exhibit itself prior to trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of a trail."

"The tribunals of this country shall

not only be impartial in the contro -versies submitted to them but shall give assurance that they are impar-tial, free from any bias or prejudice that might disturb the normal course of impartial judgment.

"At the end of the trial, although a litigant may be disappointed in the outcome, he should leave the court house feeling that he has been treat -ed fairly and that his case has been decided by aneutral and impartial arbiter."

"When a trial judge exhibits open hostility and bias, the judgment will be reversed."

In Franano v. United States (1962, CA8 Mo) 310 F2d 533, the court held:

"A court should show no bias toward either party or even tend to become an advocate for either party."

As the 5/11/99's Reporter's Transcript demonstrates, the court below had abused its discretion in refusing plaintiff's request for a 1-day continuance and judge Pregerson had displayed his hostility and bias toward plaintiff.

2. The Court Below Abused Its Discretion

In Not Allowing Plaintiff To Use An Interpreter Plaintiff Chose

In Luna v. Black (1985, CA8 Neb) 772 F2d 448, the court held:

> **"When a trial court is put on notice that there may be some significant language difficulty, the court should determine whether an interpreter is needed."**

In United States v. Bennett (1988, CA11 Fla) 848 F2d 1134, the court held:

> **"The Court Interpreters Act (28 USCS Section 1827(4)) is triggered if the presiding judicial officer determines . . . witness may present testimony in such action - (1) speaks only or primarily a language other than the English language, . . ., so as to inhibit such party's comprehension of the proceedings or communication with counsel or the judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony. Upon making such determination, the court must utilize the services of the most available certified interpreter, or the services of an otherwise competent interpreter."**

The 5/11/99's Reporter Transcript can show the court below had abused its

discretion when it refused to continue the trial the next day as plaintiff's attorney had a conflict of his schedule and when it refused plaintiff's request to have other competent interpreter to help plaintiff during the trial.

3. The Court Below Abused Its Discretion In Refusing To Admit Exhibits Showing Defendants Had Falsely And Fraudulent -ly Accused Plaintiff On 4/3/96

Under 1993 Amendment to Rule 26 of FRCP, parties must, without awaiting a discovery request, voluntarily identify and disclose all witness and documents "relevant to disputed facts alleged in the pleadings" (FRCP 26 (a)(1)).

Under FRCP 26 (e)(1), defendants and their attorneys have an ongoing duty to supplement their initial disclosures at appropriate intervals "upon determining that the initial disclosures are material -ly incomplete or inadequate."

In Herbert v. Lando (1979) 441 U.S. 153, 99 S.Ct. 1635, the Supreme Court held that:

> "The basic purpose of discovery is to take the game element out of trial preparation by enabling parties to obtain evidence necessary to evaluate and resolve their dispute beforehand."

In Wm. T. Thompson Co. v. General Nutrition Corp. (CD CA 1984) 593 F.Supp 1443 and Computer Assoc. Int'l, Inc. v. American Fundware, Inc. (D CO 1990) 133 FRD 166, the courts held that:

> "A litigant may be obligated to preserve what it knows, or reasonably should know, will be critical evidence in a pending action or one in the offering."

The court in Computer Assoc. Int'l case, supra, further held that:

> "Destruction of evidence cannot be countenanced in a judicial system whose goal is to find the truth through honest and orderly production of evidence."

In Jones v. Webb (7th Cir. 1995) 45

F.3d 178, 183, the court held that:

"Excessive force claims relating to an arrest or other seizure must be analyzed under the Fourth Amendment's objective reasonableness standard."

In Ford v. Davis 878 F.Supp 1124, 1128, the court held:

"Revelant factors to the objective reasonableness inquiry include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight".

The Davis court further held:

"The court finds that the constitutional limitations in question are clear and that a reasonable police officer would understand that hitting an arrestee with fists, feet and flashlight when not needed to effectuate the arrest is in violation of the Fourth Amendment."

In Hudson v. McMillian 503 U.S. 1 (1992), the Supreme Court held that:

"the use of excessive physical force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury."

In the instant case, as Exhibits, nos. 11 thru 22 as contained in "Plaintiff's Trial Exhibits" demonstrate, defendants and their attorneys have repeatedly evad -ed and ignored the provisions of FRCP Rule 26 and the holdings in cases cited herein. Moreover, the pages of Reporter Transcript referred in "Plaintiff's Trial Exhibits, no. 1, show, defendants had accepted the facts and evidence that plain -tiff was injured by defendant Gutierrez on April 3, 1996 (no. 1, page 84).

In Lies v. Farrell Lines, Inc. (1981, CA9 Cal) 641 F2d 765, the court held:

> "Where evidence is highly probative and it will not tend to prejudice or confuse the jury, all doubts should be resolved in favor of admissibility. Abuse of discretion may be found where no other evidence was admitted to prove that fact sought to be estab- lished by the excluded evidence."

FRE, Rule 403 only protects against evidence that is unfairly prejudicial.

Evidence is unfairly prejudicial only if it has an undue tendency to suggest decision on an improper basis, that is, commonly though not necessarily, on an emotional basis (Carter v. Hewitt (1980, CA3 Pa) 617 F2d 961).

In Crawford v. Edmonson (1985, CA9 Cal) 767 F2d 549, the court held:

> **"Since most evidence presented by one party in litigation will presumably be prejudicial to the other, in the sense that it favors the party introducing it and damages the opposing party's case, FRE 403 requires that the evidence sought to be excluded threatens unfair prejudice. Unfair prejudice is the likelihood that the evidence will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented."**

In United States v. Layton (1985, CA9 Cal) 767 F2d 549, the court held that the availability of other evidence is a factor to be evaluated in the balance, under FRE 403.

Since defendants and their attorneys have repeatedly ignored FRCP Rule 26 and Discovery Rules and failed to support defendant Gutierrez' false 4/3/96 allega -tions, the court below had abused its discretion in refusing to admit plain- tiff's Trial Exhibits.

4. The Court Below Erred In Granting Defendants' Attorney's Motion Dismis -sing Defendants Lawton and "S.G.City" During The Trial

On May 12, 1999, judge Pregerson grant -ed defendants attorney Eugene J. Egan's ("Egan") motion dismissing defendants Lawton and "S.G.City" during the trial on grounds that plaintiff failed to present evidence (RT, page 141, lines 20 - 25).

In Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp. (9th Cir. 1992) 982 F2d 363, 368, the court held:

"An inference may be drawn that evidence destroyed or suppressed was adverse to the party suppressing it.

The burden of proving it was not is thus effectively shifted to the party responsible for the suppression."

Under the 1993 Amendments to Rule 26 of FRCP 26(a)(1), which provides parties must, without awaiting a discovery request, voluntarily identify and disclose all witnesses and documents "relevant to disputed facts alleged with particularity in the pleadings."

In Committee Notes on Amendments to Federal Rules of Civil Procedure (1993) 146 FRD 401, 621, which noted:

"The early meeting and disclosure requirements are designed to encourage litigants to accelarate the exchange of basic information . . . and to eliminate the paper involving in requesting such information."

Under FRCP Section 26(a)(1)(B), which provides:

"The parties must provide copies or a description by category and location of documents in the possession, custody, or control of the party that are revelant to disputed facts alleg

-ed with particularity."

FRCP Section 8 provides:

"Simple, concise and direct allegation are ordinarily sufficient to state a claim upon which relief may be granted."

FRCP Section 26(a)(1) provides:

"parties have an ongoing duty to suppl-ement their initial disclosure at appropriate intervals upon determin-ing that the initial disclosure are materially incomplete or inaccurate."

In Francis v. Clark Equipment Co. 993 F2d 545 (6th Cir. 1993), the court held that:

"It is a reversible error to grant a motion for judgment as a matter of law during the trial unless the responding party is given opportunity to cure any deficiency in its proof that may have been overlooked."

In Taylor v. Cooper Tire & Rubber Co. (1997, CA10 Utah) 103 F3d 1395, the court held:

"Judgment as a matter of law is proper only when the evidence and all the inferences to be drawn therefrom, viewed in light most favorable to the

nonmoving party, is so patently in favor of the moving party that a jury verdict in favor of the opposing party would be improper and would have to be set aside by the trial judge."

In the instant case, defendants had failed to present evidence supporting their denials and affirmative defenses contained in defendants' "Answer to First Amended Complaint.

If the Court would review "Plaintiff's Trial Exhibits, nos. 11 thru 22, the Court would find out defendants had no evidence to support defendants' denials and affir-mative defenses, to show defendant Gutierrez had not lied during the trial, case no. 6AL01916 (Plaintiff's Trial Exhibits, no. 1), and to prove that defen-dants Lawton and "S.G.City" had policies on reserve police's training and supervision.

Since defendants had no evidence to

rebute plaintiff's assertions contained in the Complaints, the court below erred, on May 12, 1999, in granting defendants attorney's motion dismissing defendants Lawton and "S.G.City" during the trial.

5. The Court Below Abused Its Discretion In Refusing Plaintiff's Attorney To Present Statements Regarding The Traffic Violation While Allowing Defendants' Attorney To Present Traffic Violation Statements

In Anderson v. Sheppard (1988 CA6 Mich) 856 F2d 741, the court held:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness requires an absence of actual bias in the trial of cases. Our system of law has always sought to prevent even the probability of unfairness. One of the fundamental rights of a litigant under our judicial system is that he is entitl-ed to a fair trial in a fair tribu-nal and that fairness requires an absence of actual bias or prejudice in the trial of cases. If this basic principle is violated, the judgment must be reversed. Bias or prejudice may exhibit itself prior to trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in

the conduct of a trail."

"The tribunals of this country shall not only be impartial in the contro-versies submitted to them but shall give assurance that they are impar-tial, free from any bias or prejudice that might disturb the normal course of impartial judgment."

"At the end of the trial, although a litigant may be disappointed in the outcome, he should leave the court house feeling that he has been treat-ed fairly and that his case has been decided by a neutral and impartial arbiter."

"When a trial judge exhibits open hostility and bias, the judgment will be reversed."

In Franano v. United States (1962, CA8 Mo) 310 F2d 533, the court held:

"A court should show no bias toward either party or even tend to become an advocate for either party."

As the 5/12/99's Reporter Transcript demonstrates, the court below had abused its discretion in refusing plaintiff's attorney, during closing statement, making statements regarding defendant

Gutierrez' false allegation that plaintiff made a U-Turn in a business district while allowed defendants attorney making same references.

6. The Court Below Abused Its Discretion In Scheduling The Trial Date Without Consulting With Plaintiff

In re School Asbestos Litigation, 977 F2d 764 (3rd Cir. 1992), the Court held that:

> "For obvious reason of fairness, ex parte communication between judge and litigant are strongly discouraged."

As Exhibit 13 demonstrates, the court below had never contacted with plaintiff regarding the trial date. The court below gave defendants all the conveniences they wanted. As results of facts shown on Exhibit 13, the court below abused its discretion in denying of plaintiff's request for 1-day continuance and in deny-ing of plaintiff's choice of Interpreter

after plaintiff did not have an attorney during the trial on May 11, 1999.

7. The Court Below Erred In Granting Defendants' Motion In Limine To Exclude Evidence Regarding The Commis-sion Of A Traffic Violation By Plaintiff On 4/3/96

This is a simple case and defendants have made it into a complex one.

If defendants have any evidence can support defendant Gutierrez' allegation that plaintiff made a U-turn in a business district on April 3, 1996, then, defendant Gutierrez is not a racist and had the right to follow plaintiff into a parking lot at 1133 S. San Gabriel Blvd., San Gabriel, CA on April 3, 1996.

In Moore's "Federal Civil Practice", Federal Rules of Evidence, page 728, it stated:

"In general, if the proffered evidence will aid in the resolution of a factual dispute by tending to prove a matter of consequence, and the

evidence is not unduly prejudicial, misleading, or time consuming, it will be considered relevant and admissible."

In People v. Munez (1970) CA3d 562, 567, 84 CR 501, the court quoated an officer is under no duty to make an unlaw-ful arrest from Jackson v. Sup. Ct., 98 Cal.App.2d 183, 189, (2), 9 F2d 879 and held that neither is it the duty of off-icers to taunt or beat persons arrested.

In the instant case, defendants had repeatedly failed to, and would not be able to, produce any evidence to support defendant Gutierrez' allegation that plaintiff had made a U-turn in a business district and to prove defendant Gutierrez is not a racist against Asian people.

The facts that defendants attorneys' filings of motions in limine to exclude plaintiff's evidence clearly show plain-tiff has evidence to support plaintiff's

claims as alleged in Complaints and defen
-dants' attorneys did not want the Jury
to see plaintiff's evidence, that From A
pril 3, 1996 to 5/11/99, defendants and/
or their attorneys have failed to produce
evidence supporting defendant Gutierrez'
false allegation that plaintiff made a U
-turn in a business district and that he
was injured by plaintiff, that defendants
and/or their attorneys not only had no
evidence supporting defendant Gutierrez'
false allegations, defendants and/or their
attorneys had hidden evidence which would
support plaintiff's claims that plaintiff
was injured by defendant Gutierrez (See
Plaintiff's Trial Exhibits, no. 8 - Crime
Information Section), that defendants
Russo and Kermode had conspired to cover
up for defendant Gutierrez re plaintiff's
injuries, and that defendants Lawton and

"S.G.City" had no policy regarding reserve police's training and supervision clearly show the court below erred in granting defendants' motion to exclude plaintiff's evidence.

Since defendants cannot and will not win the instant case on their evidence (as said earlier, defendants have no evidence to support defendant Gutierrez' false allegations), defendants have designed to file their motions to exclude plaintiff's evidence so that defendants can win the instant case by loopholes in law and procedure.

Since facts and evidence have shown 1) defendants did not have evidence support -ing defendant Gutierrez' false allega- tions that plaintiff had made a U-Turn in a business district, 2) defendants have failed to pursue defendant Gutierrez'

false accusation that plaintiff had made. U-turn in a business district, 3) defendants had never denied the fact that defendant Gutierrez had injured plaintiff, and 4) defendants had repeatedly failed to produce any evidence supporting defendant Gutierrez' false allegation and defendants' sham denials and affirmative defenses contained in defendants' "Answer to First Amended Complaint", the court below erred in granting defendants' motion in limine and in refusing to allow the jury reviewing plaintiff's trial Exhibits.

8. The Court Below Abused Its Discretion In Denying Of Plaintiff's Motion To Take Defendants' Depositions

FRCP 16(b)(3) and in Gray v. Town of Darien (2d Cir. 1991) 927 F2d 69, 74, all stated that In almost all cases, a scheduling conference order will limit

the time to complete discovery.

On August 4, 1997, after the "mandatory status conference" was held, defendants' attorneys prepared and served a "Notice of Ruling" informing plaintiff that "all other dates and deadlines would be governed by the applicable Federal Rules of Civil Procedure" (See Exhibit 6, page 2, Lines 3 - 4).

On or about December 30, 1997, defendants' attorneys served plaintiff with defendants' "Notice of continuance of taking deposition of plaintiff Yei-Hwei Tong". There's no "Discovery Cut-Off Date" appeared on their Notice (See Exhibit 14).

On February 4, 1998, defendants were served plaintiff's "Requests for Admissions" ("RFAs"; Plaintiff's Trial Exhibits, no. 19).

The first time that "Discovery Cut-Off Date: 2/23/98" appeared on defendants' papers was after defendants were served with plaintiff's "RFAs" on February 4, 1998. This fact can show defendants have acted in bad faith.

On February 24, 1998, defendants' attorneys, based on Local Rule provisions, objected to the "RFAs" on ground that the "RFAs" were untimely even though defendants attorneys had filed their motion to continue the trial date (Exhibit 21).

On February 27, 1998, the court below granted defendants' motion to continue the trial date to May 5, 1998 (Exhibit 22). Later, the court below, again, granted defendants attorneys' request to continue the trial date.

On March 5, 1998, "Notices of Taking Deposition of Defendants . . . " ("

Notices") were served on defendants (Exhibit 14).

On or about March 11, 1998, defendants filed their "Motion for Protective Order", based on Local Rule 9.4 of the court below and asserted that plaintiff's "Notices" were untimely (Exhibit 24) while plaintiff had filed her "Notice of Motion and Motion to continue the trial date (Exhibit 29) and judge Pregerson had granted to continue the trial date (Exhibit 30).

On March 24, 1998, Magistrate Judge Eick granted defendants' motion for protective order after defendants filed their motion prohibiting plaintiff from taking their depositions.

As depicted by the copies of "Reporter Transcript", Citation no. S212757, and " Crime Information Sheet" (Plaintiff's

Trial Exhibits, nos. 1, 3, 8), defendant Gutierrez had falsified the "Police Report" and had no reason to stop plaintiff on April 3, 1996 (Plaintiff's Trial Exhibits, no. 1-Reporter's Transcript, page 9, lines 8 - 9 and 25 - 26; Page 16, lines 7 - 8; page 17, lines 19 - 20; page 19, lines 19 - 20; page 20, lines 3 - 4; page 28, lines 10 - 12; On page 7, lines 22 - 26, defendant Gutierrez' statements had contradicted the Citation no. S212757 and the "Crime Information Sheet".

FRCP 16(b) and Rosario v. Livaditis (7th Cir. 1992) 963 F2d 1013, 1019, state that "A party may obtain relief from the "Cut-Off" date by demonstrating good cause for allowing further discovery".

In Herbert v. Lando (1979) 441 U.S. 153, 99 S.Ct. 1635, the Supreme Court held that:

"The basic purpose of discovery is to take the game element out of trial preparation by enabling parties to obtain evidence necessary to evaluate and resolve their dispute beforehand."

in the August 4, 1997 court's ruling (Exhibit 6), which was prepared by defendants' attorneys, there is no Discovery Cut-Off Date. The court below had never issued any order regarding the Discovery Cut-Off Date. As a matter of fact, the Notice of Ruling states The court further ordered that all other dates and deadlines would be governed by the applicable Federal Rules of Civil Procedure.

If the Court would review Plaintiff's Trial Exhibits, nos. 11 through 22 and compare defendants' "Answer to First Amended Complaint" with the afore-said Exhibits, the Court would find out that defendants' "Answer to First Amended Complaint" is a sham pleading, because

defendants have alleged they have policy regarding training and supervising of defendant Gutierrez. As matter of facts defendants have failed to produce request -ed documents supporting their denials as contained in defendants' "Answer to First Amended Complaint".

Since that the court below had refer -red "all other dates and deadlines would be governed by the applicable FRCP", that defendants have acted in bad faith, and that the trial dates had been repeatedly continued, the court below abused its discretion in denying plaintiff's oppor- tunity to take defendants' Disposition.

9. The Court Below Abused Its Discretion In Denying Of Plaintiff's Motion To Quash Defendants' Subpenas

Plaintiff was injured by defendant Gutierrez on April 3, 1996 after defendant Gutierrez falsely accused plaintiff made a

U-Turn in a business district.

FRCP Section 26(a)(1)(c) povides that parties are required to disclose their damage computations and to make available for copying any nonprivileged documents or evidentiary materials on which the calculation is based.

In defendants attorney Waterman's Subpenas, he subpenaed all of plaintiff's medical records from plaintiff's medical doctors. Thus, the court below abused its discretion in denying of plaintiff's motion to quash defendants' Subpenas, because defendants attorney Waterman should not, and had no right, to violate plaintiff's right to privacy for medical records prior to April 3, 1996.

10. The Court Below Erred In Dismissing Plaintiff's Claims Against Defendants For Violations Of Sections 1981 And 1985(3) And Claims Against Defendants D. Russo And Jim Kermore For Violations Of Section 1983

In Rutherford v. City of Berkley, 780 F2d 1444 (9th Cir. 1986), the court held that:

> "Citizen, alleging that, without provocation and without placing him under arrest, defendant police officers detained him, throw him to the ground, punched, kicked, and handcuffed him stated a Section 1983 claim for deprivation of substantive due process, notwithstanding existence of a basis for liability under State tort law."

In People v. Delahoussaye (1989) 213 Cal.App.3d 1, 7, the court held that:

> "A peace officer is not engaged in the performance of his duties within the of PC Section 243 if he arrest a person unlawfully or uses excessive force in making the arrest."

In People v. Curtis (1969) 70 Cal.2d 347, 357, the court held that:

> "An officer is not engaged in the performance of his duties when he detained a person without probable cause."

Plaintiff's Trial Exhibits, nos. 1, 3, 4, 6, 11 - 22 have proved defendant

Gutierrez had no reason to stop plaintiff on April 3, 1996 and, then, falsified his "Police Report", falsely accused plaintiff injured him, and fraudulently told conspirator D. Russo to falsely accuse plaintiff committed "Felony" while the following Exhibits support plaintiff's assertions:

1. Citations, S212757, S215400, 4/3/96 (defendants and their attorneys have fail-ed to present any evidence supporting defendant Gutierrez' allegation that plaintiff made a U-Turn),

2. Crime Information Section (Defen-dants and their attorneys have failed to produce this document in hope to mislead the court below on their meritless arguments),

3. Complaint Request, City of San Gabriel Police Department submitted by

defendant Lawton, 4/22/96 (It shows defendant Lawton had no evidence to support defendant Gutierrez' false allega -tion and Conspirator D. Russo's false accusation that plaintiff had committed a "Felony" as Citation S212757 alleged).

4. Defendants attorneys' Disclosures of Defendants at Meeting of Counsel, 2/4/98 (Defendants and their attorneys have failed to produce the "Crime Imforma -tion Section" and Police Logs showing defendant Gutierrez had called his super -visor and Back-up unit on April 3, 1996. In the Reporter's Transcript, defendant had contradicted his "Police Report" and his false allegations.

5. Plaintiff's Disclosures at Meeting of Counsel, 2/4/98.

6. Reporter's Transcript, 6AL01916, Pages 16, 17, 19, 23, 24, 26, and 84. (

These pages can show defendants had violated plaintiff's civil rights under 42 U.S.C. Secs 1983, 1985, 1988).

7. Second Amended Complaint, TONG v. GROVER, et al., EC 023242, Los Angeles Superior Court (This can show plaintiff's conviction of lesser included offense of PC Section 243 (b) was due to attorney's incompetent and unprofessional performance when plaintiff was relied on him. This can also show defendants and their attorneys have misled the court into issues which they knew were false. This Exhibit not included in this Appeal).

In the instant case, as Exhibits 1 thru 23 contained in "Joint Exhibits List" (Exhibit 12) demonstrate, defendants and their attorneys have repeatedly evaded and ignored the provisions of FRCP Rule 26 and the holdings in cases cited herein.

Moreover, the pages of Reporter's Transcript (Plaintiff's Trial Exhibits, no. 1 show, defendants had accepted the facts and evidence that palintiff was injured by defendant Gutierrez on April 3, 1996 (no. 1, page 84). Thus, there should be no evidentiary problem as defendants' attorneys alleged.

Since defendants and their attorneys had repeatedly ignored FRCP Rule 26 and Discovery Rules and failed to support defendant Gutierrez' false 4/3/96 allega-tions, judgments in favor of plaintiff against defendants should be entered. Thus, the court below erred in dismissing plaintiff's claims against defendants as alleged in the Complaints.

CONCLUSION

The statements made by judge Pregerson, during the trial on May 11, 1999 and in

the presence of the jury, regarding the 1-day continuance request and the Interpreter after judge Pregerson refused to wait for plaintiff's attorney to come to the trial on May 11, 1999, were so seriously prejudiced plaintiff and deprived plaintiff of a fair trial.

In Rivas v. Brattesami 94 F3d 802 (2d Cir. 1996), the court held that:

> "Where the cumulative impact of a district court's comments in the presence of the jury resulted in an fair trial, a new trial will be order-ed. Where the judge's impartiality has been seriously called into question by his comments before the jury and he made especially hostile comments to counsel, even though made outside the jury presence, the aggrieved party is entitled to a new trial before a different judge."

In Santa Maria v. Metro-North Commuter R.R. 81 F3d 265 (2d Cir. 1996), the court held that:

> "A court must strive for that atmosphere of perfect impartiality which is so much to be desired in a judicial

proceeding, and must be especially cautious and circumspect in language during a jury trial. A judge must strive to be a model of patience and impartiality, even when faced with an irratating attorney."

If the court would review the Reporter Transcrpt regarding the trial on May 11, 1999, the court would find out plaintiff had been mistreated by judge Pregerson. Judge Pregerson's temperament was very bad and showed his bias and prejudice toward plaintiff. He not only showed his angers at plaintiff when plaintiff request -ed a 1-day continuance or an Interpreter of plaintiff's choice. He also had denied plaintiff's request to present Plaintiff's Opening Statement by plaintiff's attorney on May 12, 1999. Since plaintiff was not received a fair trial on May 11 and 12, 1999, the judgment should be vacated and reversed and a new trial should be ordered by this Court.

DATED: November 29, 1999 E - 45